NO. 2483

United States

Circuit Court of Appeals

For the Ninth Circuit

OCTOBER TERM, 1915

GEORGE W. ALBRECHT,

Plaintiff in Error,

vs.

J. E. RILEY and M. H. MARSTON, Co-partners Doing Business as RILEY and MARSTON,

Defendants in Error.

BRIEF FOR PLAINTIFF IN ERROR

Upon Writ of Error to the United States District Court of the Territory of Alaska, Fourth Division

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In Propria Persona.

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STATEMENT OF THE CASE

Plaintiff claims to be the owner by purchase and entitled to the possession, of a certain unpatented placer mining claim at the head of Boulder creek, in Otter Precinct, Fourth Division, Territory of Alaska, and brought this action in the district court at that place, for the recovery of damages from the defendants, alleging trespass upon said claim, and cutting, and removing

timber and wood therefrom by said defendants, and their agents and servants; and claiming treble damages therefor under Section 322 of Chapter 33, Part IV, of Carter's Codes of Alaska, which reads as follows:

> "Sec. 322. Whenever any person shall cut down, girdle, or otherwise injure or carry off any tree, timber or shrub on the land of another person, etc., * * * without lawful authority, in an action by such person, etc. * * * against the person committing such trespasses, or any of them, if judgment be given for the plaintiff it shall be given for treble the amount of damages claimed or assessed therefor, as the case may be."

Defendants answered, pleading general denial, and setting up an affirmative defense that the placer mining claim involved was only a "pretended mining location," and that the ground was chiefly valuable for the timber thereon; and that the same was located by the original stakers thereof for the timber and not for the minerals.

To the affirmative defense plaintiff demurred, which demurrer was by the court overruled; the defendants then in open court asked leave to file an amended answer, which the court granted, and ordered same to be filed forthwith. No amended answer was ever filed, and in due time plaintiff moved for a default, which was denied.

Plaintiff thereupon replied to the answer, and a trial was had upon the issues as made; plaintiff endeavoring to prove a valid mining location, and a chain of title from the locators, resting in himself; the cutting and removing of the timber by the defendants and their agents and servants; and the damage to the claim based upon the cost of replacing the wood, or other

wood, back on the ground in question, for the purpose of working and mining the same.

Defendants sought to discredit the validity of the mining location by showing large quantities of timber originally on the ground, and that the ground was more valuable for its timber than for mining purposes; and showed, over plaintiff's objection, the results of recent pannings of debris at the mouths of old prospect shafts on the claim; and also sought to show that the annual assessment work had not been done continuously, in that plaintiff had not proved said work done for the year 1912, and that the claim thereby became forfeited.

Defendants further endeavored to show that the wood was cut before plaintiff took title, and that the taking away was afterwards.

The trial court held, that as forfeiture had not been pleaded, the same could not be considered, and that as for the other matters, they were for the consideration of the jury.

However, upon his own theory that no more than nominal damages had been proven, the court directed a verdict for the defendants, and upon that verdict a judgment was rendered and entered in favor of the defendants.

From which judgment plaintiff appeals and brings the case to this court upon Writ of Error.

BRIEF OF THE ARGUMENT

I.

The Court erred in overruling plaintiff's demurrer to defendants' first affirmative answer; for the reason that the same does not state facts sufficient to constitute a defense.

Defendants' answer (Abs. 6) consists of a denial; and, as a further and affirmative defense, alleges:

1. A fraudulent or "pretended" location of the premises as a placer mining claim, by plaintiff's predecessors in interest;

2. That the said premises were without value for minerals, and of value solely for its trees and timber;

3. That no discovery of gold was ever made within the boundaries of said mining location.

All of which amounts to no more than a denial of the plaintiff's title.

By their general denial in their answer, defendants put in issue:

(a) Title, or right of possession in plaintiff;

(b) Commission of the offense charged;

(c) Amount of damages.

26 A. & E. Enc., 1st ed., 631, and notes.

Affirmative matter which may be set up in an answer must necessarily be something more than that which may be proven under the general denial; therefore, denial of title, being already in issue, is not new nor affirmative matter, and should not be set up in defense.

Hastings v. Anacortes Packing Co., 69 Pac. 776.

Defendants do not in any way connect themselves, nor try to connect themselves, with any third party claiming title, interest, or right of posssesion in or to the premises; nor do they claim any such title, interest, or right of possession, for themselves.

Defendants being mere trespassers, have no right to in-

quire into the good faith of the plaintiff's possession; nor to question the validity of his title.

Eberhard v. Tuolumne Water Co., 4 Calif. 308.

Strepy v. Stark, 5 Pac. 116.

Carter v. Maryland P. R. Co., 77 Atl. 301.

Reed v. Price, 30 Mo. 442.

Meydenbauer v. Stevens, 78 Fed. 794.

Rooney v. Barnette, 200 Fed. 705.

Haws v. Victoria Copper Mining Co., 160 U. S. 316, 317.

"A person who is in constructive lawful possession of a mining claim, even though he is not the rightful owner, may maintain trespass against one who merely sets up title in a third person under whom he does not claim."

Attwood v. Fricot, 17 Calif. 37.

Page v. Fowler, 28 Calif. 610.

Nelson v. Mather, 5 Kan. 151.

"One who has entered upon land in the constructive possession of others by reason of their paper title, cannot resist a recovery by them by showing an outstanding title in another."

Jones v. Patterson, 66 S. W. 377.

"In an action for trespass, where the plaintiff had title, and at least constructive possession, and the defendant had knowledge that he was cutting on the plaintiff's premises, with no evidence to show any right in the defendant, and no connection with a stranger who claimed title, held, that the defendant was a mere intruder, and that evidence of title in a third person would not justify the act, or present an available defense."

Miller v. Decker, 40 Barb. 228.

Jackson v. Gunton, 26 Pa. Super. Ct. 203.

And in such a case as this there was no right of complaint save in the government.

Doll v. Meador, 16 Calif. 331.
Rhodes v. Craig' 21 Calif. 419.
O'Connor v. Frasher, 56 Calif. 499.
Wright v. DuBois, 21 Fed. 694.
Peabody Gold Mining Co. v. Gold Hill Mining Co., 111 Fed. 817.
Field v. Seabury, 19 How. 333.
Steel v. St. Louis Sm. & Ref. Co., 106 U. S. 447.
Health v. Wallace, 138 U. S. 573, 585.
Barden v. Northern Pac. R. Co., 154 U. S. 288, 327-330.

"A mere intruder and trespasser cannot make his wrongdoing successful by asserting a flaw in the title of the one against whom the wrong has been committed."

Rooney v. Barnette, 200 Fed. 705.
McIntosh v. Price, 121 Fed. 716, 718.
Haws v. Victoria Copper Mining Co., 160 U. S. 303, 317.

A defendant who is a mere trespasser cannot justify his act by showing a true title to be outstanding in a third person.

Bird v. Lisbros, 9 Calif. 1.
Piercy v. Sabin, 10 Calif. 30.
Coryell v. Cain, 16 Calif. 572.
Hughes v. Devlin, 23 Calif. 501.
Omaha & G. S. & R. Co. v. Tabor, 21 Pac. 925.

And especially is this so where the defendant does not seek to connect himself with such third party.

38 Cyc. 1058, par. 1, and notes 9 and 10.
Branch v. Doane, 18 Conn. 233.

Weimer v. Lowery, 11 Calif. 112.

Omaha & G. S. & R. Co. v. Tabor, 21 Pac. 925.

"The rule is universal that when the character of the land is in issue it is one for the Land Department to decide, and not for the courts."

Wright v. Town of Hartville, 81 Pac. 651.

And if this be true when the question arises between different claimants, how much more is it true when the defendant makes no claim whatever—simply alleges a flaw in the plaintiff's title on account of the character of the land.

The determination of the character of the land is entirely and solely in the Land Department.

1 Snyder on Mines, secs. 158 and 701.

Lee v. Simonds, 1 Ore. 158.

Heath v. Wallace, 138 U. S. 573.

Barden v. Northern P. R. Co., 154 U. S. 318, and cases noted.

Ryan v. Granite Hill M. & D. Co., 29 L. D. 522.

Nelson v. Brownell, 193 Fed. 642.

Lassley v. Brownell, 199 Fed. 772.

These last two cases being from Alaska.

"Until land is patented, enquiry as to equitable rights comes within the cognizance of the Land Department, and the Courts will not anticipate its action."

Oregon v. Hitchcock, 202 U. S. 60-70; 50 L. Ed. 938.

"The evidence that the ground was not valuable for mining purposes could not be admissible on general principles. * * * If the title to mining ground could be defeated by such evidence, no claim which was not paying could be considered secure."

Correa v. Frietas, 42 Calif. 345.

Evidence of a valuable growth of timber on the land does not affect applicant's claim to a patent for placer mining purposes.

Jackson v. Roby, 109 U. S. 440.

U. S. v. Iron Silver Mining Co., 128 U. S. 673.

"Where one has made a valid location on public land mere trespassers making no claim to the ground under any of the public land laws cannot oust the mineral locator from possession by showing that the land is more valuable for some purpose other than mining."

3 Lindley on Mines, sec. 717, page 1756.

Veronda & Ricoletto v. Dowdy, 108 Pac. 482.

II.

The court erred in denying (Abs. 14) plaintiff's motion, filed on June 27, 1913 (Abs. 13) for an order of default and judgment against the defendants, for the reason that the said defendants, in open court, on the 12th day of September, 1912 (Abs. 10), applied for and obtained permission by order of said court on said day, to file forthwith an amended answer in said cause; that thereafter they wholly failed and neglected to file such amended answer.

1. The defendants, by obtaining permission to file an amended answer, thereby elected to abandon the original, and, upon failing to file an amended one "forthwith," as by the order called for, were in default.

"Where leave is asked and granted in an action, not to amend the narr. by filing an additional count, but only to file amended narr., the original narr. must be held to be withdrawn."

Commissioners of Aberdeen v. Bradford (Md. 1912) 51 Atl. 614.

"This application to re-plead constituted an election to abandon the answer."

Nye v. Bill Nye Gold Min. & Mill. Co. (Ore. 1905), 80 Pac. 96.

Seawell v. Crawford, 55 Fed. 729, and cases cited therein.

" * * * this is what defendants did when they obtained leave to file an amended answer to the complaint. But it is said they have not complied with the order, and did not file the answer within the time allowed. If this is the case, * * * plaintiff's remedy was an application to the court below for judgment for want of an answer. * * * "

Gaines v. Cyrus (Ore. 1893), 31 Pac. 833.

In the case of Gettings v. Buchanan (Mont. 1896), 44 Pac. 77, the court, in considering and summing up all the cases cited as against the above, says:

"We have examined these cases and find that in their facts they are divisible, perhaps, into three classes: (1) Where the parties went to trial on the old answer; (2) where the defendant elected to stand on the old answer; (3) where it did not appear that the defendant had elected to file a new answer. It is to be observed, however, that in this case the defendant was not in the position set forth in either of the above classifications. On the contrary, he himself elected to file a new answer. * * * He expressly and in open court elected to plead over."

In the case of Machine Co. v. Redfield, 18 Kan. 555, cited with approval in the foregoing case, Justice Brewer is quoted:

"The court then had power to require an answer to be filed, for, though the language of the statute is 'allow,' yet we think this grants something more than mere author-

> ity to consent. But, even if not, the order in this case was by consent of parties, and the court certainly had the power to enforce compliance with an order to the entry of which the parties had consented. It seems to us also that it was the duty of the court to enforce the order, and that the plaintiff had a right to rely upon compliance, or take advantage of the default."

In the case now being reviewed, had the parties gone to trial on the original answer, an amended answer would have been waived; or, if the defendants had elected to stand on the original answer, they could have done so, for it would be a foolish thing to require the filing of a new answer which could easily be a mere duplicate of the old; and, if the defendants had said nothing, it would have left the pleadings in order as they stood. But none of these things happened; and instead, the defendants asked and were granted leave to file an amended answer, thereby under all the decisions, clearly electing to abandon the original answer; and, upon failing to file an amended answer "forthwith," were in default.

To hold, as the lower court did, that the defendants had not elected, places plaintiff in the position that he must claim a default to shut off an amended answer, and must prepare to meet the original answer and also to resist an application to open the default, and in the end have no possible way of knowing which ground the defendants will "elect" to stand upon, a position which it is the exact object of all pleading to avoid.

III.

The court erred in requiring plaintiff to prove the original location of a placer mining claim by plaintiff's predecessors in interest. (Abs. 28.)

Trespass may be maintained by one in possession, actual or constructive, and title, in such a case as this, is constructive possession.

"Constructive possession of land is that possession which the law presumes the owner has, in the absence of evidence of exclusive possession in another."

(Me. 1911) Inhabitants of Millinocket v. Mullen, 78 Atl. 1120.

"Constructive possession follows legal title, the rightful owner being deemed in possession until he is ousted or disseized. Possession follows the title, in the absence of actual possession adverse to it."

(Ark.) Woolfolk v. Buckner, 55 S. W. 168.

"The title, whether with or without possession, which will support an action in trespass, is most commonly obtained by deed."

26 A. & E. Enc., 1st ed., 587.

"The Supreme Court of the Territory (Montana) argue that the trial court can regulate the order of admission of evidence in a case, and because the plaintiff did not introduce, first of all, proof of their mining records, which were lost, nothing else could be introduced. For want of these, evidence of actual possession, of title-deeds, of the location of the claim, and the record of the former suit determining the rights of the parties to the locus in quo, were all unavailing and inadmissible.

"We know of no rule of law which justifies this action."

Campbell v. Rankin, 99 U. S. 265; 25 L. Ed. 435.

And pleadings may be amended to conform to the proof.

Black v. Teeter, 1 Alaska, 564.

Therefore it was error to require that any particular fact be proven.

This argument also applies to this phase of Specification VI, the court therein holding that it was incumbent upon the plaintiff to show ownership. (Abs. 106.)

This likewise applies to Specification VII. The court erred in deciding: "It is necessary, of course, to show a valid location; that is, to show such a discovery as is required by law." (Abs. 106.)

And also to specification VIII. The court erred in further deciding as follows: "If it conclusively appeared that plaintiff had no title at the time the trespass was committed, of course, there would be no damage."

IV.

The court erred in granting defendants' motion for a directed verdict at the conclusion of the testimony.

If there had been a total failure of proof on the part of the plaintiff, a directed verdict against him would have been proper, but there was evidence on every proposition necessary to be sustained, which, if believed by the jury, would have justified a verdict for the plaintiff, in accordance with the prayer of the complaint.

In the evidence the title of the plaintiff was affirmatively fully shown; and not at all controverted, save by an attempt to show that the mining claim was not now valuable for minerals, and that therefore there could not have been a valid discovery; hence no claim, and no basis of title.

All of which was inadmissible as evidence, and not true as a matter of reason, or of law.

But if held otherwise there would be a "question of fact for the jury to determine," as the court said. (Abs. 107.)

The facts of cutting and of removing the wood were not

denied, but there was an attempt to evade the responsibility therefor by trying to show that the cutting was done before the plaintiff took title, and the removing afterward. The proof of this all depended upon the not very positive assertion of Robert Mann, "I am almost sure that I got through about the middle of September." (Abs. 65.)

Mr. Mann himself testified that he "cut for Mr. Riley in the fall" (Abs. 56), and in view of the circumstances the jury might well have considered that "about the middle of September" did not necessarily mean that no wood was cut after the 15th day of September, when the plaintiff took title (Abs. 23), noting that in his positive statements Mr. Mann fixed the date as October 1st. (Abs. 64.)

Furthermore, none of the statements of Mr. Mann had to be, as a matter of law, accepted as true.

The matter was for the jury.

The defendants did not, in evidence, deny getting the wood, nor going upon the premises of the plaintiff to get it, nor its value; and the questions of trespass, damages, and the amount, should have been left to the jury.

> "The action was for trespass; the question of damages is a question particularly for the determination of the jury."
>
> (Calif. 1853) Drake & Burlingham v. Palmer, Cook & Co., 4 Calif. 11.
>
> "Where there is evidence to show the constitutive facts advanced by the party sustaining the burden of proof, it is for the jury to say whether the evidence is sufficient for that purpose."
>
> 2 Thompson on Trials, sec. 2243; quoted with approval in

(Kan. 1908) Harrod v. Latham M. & C. Co., 95 Pac. 14.

"A case should be submitted to the jury unless there is an entire lack of evidence tending to maintain the issues on behalf of the plaintiff, or, unless upon the whole case made by the plaintiff himself, it appears beyond doubt that the plaintiff has no right to recover."

Tippin v. Ward (1875), 5 Ore. 450.

"Of course, such an instruction could not be upheld where there was conflicting evidence as to material facts, which the jury had a right to pass on; but, where there is no substantial conflict of evidence as to the facts determinative of the case, or such facts are admitted, there the judgment will not be reversed for such instruction, although **the practice is hazardous, and can be sanctioned only in the clearest of cases.**"

O'Connor v. Witherby (Calif. 1896), 44 Pac. 227.

V.

The court erred in holding and deciding that no title to the wood passed under the conveyance to the plaintiff, because said wood was cut before the date of the said conveyance. (Abs. 105.)

While it is not at all certain that "the wood was all cut, not prior to the date alleged in the complaint, but prior to the time of the conveyance to the plaintiff, and that it was there on the ground, not requiring anything further to be done to it," yet that question, if material, was for the jury.

In considering this phase of the court's decision, one is impelled to ask the question, or questions:

To whom, then, does the wood belong?

Suppose the wood had been cut by the locator of the claim; he could not sell it, because it was not his to sell; the wood and timber on the mining claim was part of it, exempt

from molestation except for use in developing the claim, being an absolute necessity thereto.

All he sold was his possessory right to that mining claim; he owned nothing on it except his possessory right, and when he let that go he let go everything pertaining to the mining claim.

The government did not own it, except in trust for the locator. The government could not sell it, except for the benefit of the locator or possessor of the mining claim.

See Anderson v. U. S., 194 U. S. 394; 48 L. Ed. 1035.

The natural supposition, then, is that the wood, either standing or cut, went with the mining claim, and became part of it, passing to the new owner of the possessory right, for mining purposes only, and was subject to protection under Sec. 322 of Chapter 33, Part IV, of Alaska Code of Proc.—whenever any person shall cut down **or** carry away any tree, timber, etc.

This was an unpatented placer mining claim, and the only possible title or right which anyone had or could get was the possessory right to use the wood in the working and improvement of the claim.

2 Lindley on Mines, sec. 551.

Teller v. U. S., 113 Fed. 273.

> "A person occupying a portion of the public land as mining ground under the mining law of the United States is not bound to purchase the same, but until he does so he has mere license to work the ground for the precious metals therein, and has no right to cut or use any timber growing or found thereon, except as the same may be necessary to enable him to mine the same conveniently."

U. S. v. Nelson, Fed. Cas. 15, 864.

Notwithstanding the fact that it may be treated as per-

sonalty for the purpose of replevin, its true nature is much nearer that of a fixture, as it cannot be used save in connection with the ground from which it was taken.

"To convert an article which is part of the freehold into a chattel state by severing it from the realty, the act of severance must be done by one having authority or right to do so."

Lewis v. Rosler (1880), 16 W. Va. 333

"In Brock v. Smith, 14 Ark. 431, it was held that where one entered upon land as a trespasser, felled timber, and split it into cordwood, the bestowal of his labor in splitting the timber into cordwood neither wrought a change in its specific character nor gave him any title by accession."

1 A. & E. Enc., 1st ed., 55.

"Therefore where timber is cut by a trespasser without the owner's assent, he may claim it as part of the freehold while it remains upon his premises."

Altemose v. Hufsmith, 45 Pa. 121.

Harlan v. Harlan, 15 Pa. 507; 53 Am. Dec. 612.

The United States could not take the wood, nor dispose of it while on the claim, nor could the owner of the claim invoke the aid of the United States.

"The owner of a mining claim has the right to the timber thereon, and must protect it from trespassers. He cannot look to the government to bring suit for him."

1 Barringer & Adams, page 601.

The rule is laid down in the case of U. S. v. Anderson, 194 U. S. 394, 48 L. Ed. 1035, that where one has done all that is necessary for him to do to acquire title to government land, and thereafter iron and stone is removed by trespassers, the damage therefor is done to the claimant under the government.

Applying that rule to this case, the valid inception of a placer mining claim confers upon the locator the right to recover damages for cutting or removing timber therefrom after the initiation of his rights.

Had this ground been ordinary timber land from which the plaintiff's grantor had a right to remove the timber, then it might well be claimed that cordwood completely severed from the realty did not pass by an ordinary conveyance of the land alone. Or if it had been public land at the time of the cutting of the cordwood, and the plaintiff had sought to get title to the land afterward, by location, it is thought that the title to the wood might remain in the government; although most of the cases found have been Canadian which hold the other way—that title passes to the locator.

So long as this remained a placer mining claim—that is, until its abandonment, or its cancellation by appropriate action by the government—there was no legal right or power on earth by which that timber could be taken away from the ground; hence, in all reason it must be held to be an essential part of the ground itself, and to pass with it by deed.

Reasoning by analogy from the law of accession, or from the law of fixtures, this cordwood must be deemed to have been the property of the plaintiff at all times after his taking of title—it was "essentially a part of the freehold."

> "As between vendor and purchaser, the intention of the owner as to the annexation of a fixture to the freehold may be of little weight if the structure is essentially a part of the freehold, and is so entirely indispensable for the use for which the freehold is intended that the secret purpose of the owner cannot control the rights of others which de-

pend upon the inference to be drawn from what is external and visible."

In re Beeg, 184 Fed. 522.

"The court here said that, applying the general principle that all movables intended for the exploitation of the fundus became incorporated into it, it would seem clear that all materials intended to be used in building and repairing should be immovables by destination."

Morton Trust Co. v. American Salt Co., 149 Fed. 540.

And similarly stone gathered upon the land [Ellis v. Wren, 1 S. W. 440] and building material generally [Rahm v. Domayer, 15 L. R. A. (N. S.) 727] have been held to pass with the land.

"Whether personalty connected with or attached to realty becomes a part thereof, so that it cannot be removed therefrom, depends on the circumstances under which placed on the realty, the uses to which it is adapted, and the intent of the parties."

Pendley Brick Co. v. Hardwick & Co. (Ga. 1909), 64 S. E. 664.

And the intention is found in all the facts and circumstances.

McCammon v. Cooper (Ohio), 69 N. E. 658.

Madison v. Madison (Ill.), 69 N. E. 625.

There being nothing to the contrary alleged nor shown, it must be presumed that the parties, grantor and grantee, had intended obedience to the law, and all the facts and circumstances irresistibly point to the intent that the wood should pass with the ground. There was nothing else which could possibly happen to it, being "there on the ground."

Turning from reasoning by analogy to the law of transfer

of property: Probably few text-writers are, or have been, more careful of their language than is Devlin, the author of The Law of Deeds, and he says: A deed conveys not only the land described, but everything appurtenant to it.

2 Devlin, 3d ed., sec. 1192.

Black's Dictionary gives: "Appurtenant. Belonging to; accessory or incident to; adjunct, or annexed to; answering to accessorium in the civil law." (2 Steph. Comm. 30, note.)

Of course the trespasser who cut the wood had no intention of using it on the claim, but it would seem as though cordwood which can have no legal use other than on and for the benefit of the placer mining claim from which it was cut, must be "appurtenant" and pass with the deed.

And if it be insisted that the cordwood must be personalty without regard to considerations other than its physical nature, still

> "the rule with respect to chattels of this character [not attached] is, that if they are intended for use on the land on which they lie, they pass by a deed of the realty."
>
> 2 Devlin, 3d ed., sec. 1205.
>
> "The general principle seems to be that all articles that may properly be considered as belonging to the real estate, necessary to its use and enjoyment, whether firmly fixed or temporarily detached, or from their nature only constructively annexed, pass by a deed of the land."
>
> 2 Devlin, 3d ed., sec. 1207.
>
> "Where the deed of realty makes no reference to the personal property thereon, it is a question for the jury whether the parties to the conveyance intended that stakes and boards piled on the realty for use in making general repairs were to pass to the grantee."
>
> Hinkle v. Hinkle (1879), 69 Ind. 134.

"Personalty fitted to be used with realty and essential to its enjoyment, and on the realty at the time of its conveyance, will pass with the realty."

Farrar v. Stackpole (1829), 6 Me. 154; 19 Am. Dec. 201.

VI.

The court erred in holding and deciding (Abs. 106): "There is no title shown to the land or wood, and it seems to me that it is incumbent upon the plaintiff, having alleged that he was the owner, to show something in the nature of ownership at least."

Title to the land is shown:

by the testimony of C. Purdy, as to the staking and marking of the boundaries of the claim (Abs. 29 to 33, and 46).

by the testimony of J. F. Fox, as to the staking and marking of the boundaries (Abs. 33, 34 and 37); as to discovery (Abs. 38 to 41); and as to recording (Abs. 39); the latter point being also shown by the original records (Abs. 35).

by the testimony of Purdy (Abs. 46); of Fox (Abs. 41); of W. R. Day (Abs. 48 and 51); of F. L. Kehoe (Abs. 50); which, with plaintiff's Exhibits "A" (Abs. 17), "B" (Abs. 19), "C" (Abs. 20), and "D" (Abs. 23), show a clear chain of title to the entire placer mining claim, the Elliott association, resting in the plaintiff.

The plaintiff's possession is shown at page 53 of the abstract:

"No acts are required as evidence of the possession of a mining claim, other than those usually exercised by the owners of such claims. A miner is not expected to reside on his claim, nor build on it, nor cultivate it, nor enclose it."

English v. Johnson, 17 Calif. 107.

Evidence of title raises a presumption of possession; and evidence of possession raises a presumption of title—one aids the other.

> "Evidence of title raises a legal presumption of legal or constructive possession."
>
> Abbott's Trial Brief, 2d ed., 535.
>
> "Possession under claim and color of title is sufficient evidence of title as against a mere trespasser."
>
> Douglass v. Dickson, 1 Pac. 541.
>
> "Possession under invalid location makes color of title."
>
> Protective M. Co. v. Forest City M. Co. (Wash.), 99 Pac. 1033.

As is said by the court in M'Quillan v. Tanana Elec. Co., 3 Alaska, 119:

> "It must not be overlooked that Section 322 of the Alaska Code of Civil Procedure is as much an Act of Congress as are those provisions by which the United States maintains civil and criminal suits against trespassers upon its lands, and that it is the latest expression of Congress on that subject. The miner is given a property interest in his claim, and in Section 322, Congress has also declared that whenever any person shall cut down, * * * **or carry off any tree, timber,** etc., without lawful authority, the person so injured may recover treble damages for the injury."

As to plaintiff's peaceable and lawful possession, defendant was a wanton trespasser, and must respond in such damages as it has caused them.

A qualified locator who has in good faith located a valid placer mine and is in possession thereof in strict compliance with the mining laws ought to have, and in said Section 322 does have, a right to protect his timber thereon.

A valid location of a placer mining claim confers upon the locator and owner the right to recover treble damages from a wanton and willful trespasser for cutting and removing trees therefrom.

McQuillan v. Tan. Elec. Co., 3 Alas. 110.

The character of the title claimed by the plaintiff, and proved at the trial, is thus described by the Supreme Court of the United States:

> "They were discoverers of the claim. They marked the boundaries by stakes so that they could be readily traced. They posted the required notice, which was duly recorded in compliance with the regulations of the district. They had thus done all that was necessary under the law for the acquisition of an exclusive right to the possession and enjoyment of the ground. The claim was thenceforth their property. They needed only a patent of the United States to render their title perfect, and that they could obtain at any time upon proof of what they had done in locating the claim, and of subsequent expenditures to a specified amount in developing it. Until the patent issued the government held the title in trust for them or their vendees."

Noyes v. Mantle, 127 U. S. 348; 32 L. Ed. 168.

The court in the case at bar seems to have been of the opinion that no title at all was proved by the plaintiff.

And even if the above showing was not such as to satisfy the mind of the court, still, if the question of title were a necessary one to be answered, **the jury should have passed upon it.**

IX.

The court erred in deciding (Abs. 108):

> "It is an action to recover treble damages, under the

statute, for the injury suffered by the cutting of standing timber, and there must be some damage shown to the plaintiff before he can recover; that is, before he can recover anything more than nominal damages. I fail to see that anything more than that has been suffered by this plaintiff."

This can only be true upon the assumption that the plaintiff had no title in the wood, but as we have shown, the title to the wood did, as a matter of fact and as a matter of law, rest in the plaintiff. There was plenty of evidence as to the value of the wood (Abs. 66 to 68), and it is a matter of common knowledge that the timber on a placer mining claim in Alaska is a valuable and necessary aid to its proper and economical working.

McQuillan v. Tanana Electric Co., 3 Alaska, 120.

If the wood were taken, which question of fact is for the jury, then as a matter of law there must have been very substantial damages.

McQuillan v. Tanana Electric Co., 3 Alaska, 120.

And the amount of the damages should have been assessed by the jury.

Drake & Burlingham v. Palmer, Cook & Co., 4 Calif. 11.

This is an action brought under the statute, Section 322, Chapter 33 of Part IV of Carter's Codes of Alaska, which reads as follows:

"Sec. 322. Whenever any person shall cut down, girdle or otherwise injure **or carry off** any tree, timber, shrub on the land of another person, etc., etc., without lawful authority, in an action, etc., if judgment be given for

the plaintiff, it shall be given for treble the amount of damages claimed, etc."

We contend that this section goes to the **carrying off** of timber, windfalls, logs, without such cutting down; the statute nowhere confines itself to standing timber, so that it makes no difference whether the timber was cut either before or after plaintiff's possession. We cannot see that such a legal quibble would give any trespasser a right to go on plaintiff's land and steal his wood, and get away with it, because he did not cut it, or because the trees were not standing.

X.

The court erred in deciding (Abs. 108):

"The wood was severed from the property prior to the time the conveyance was made to the plaintiff, and if the jury should find he was the owner at the time the wood was taken away, there is nothing to show what the damage was. There is nothing more than the entry upon the land. Damage, of course, would be presumed, but not substantial damage."

There are here errors in fact—questions which were for the jury—and error of law in holding, "There is nothing more than the entry upon the land," as well as the error of law in refusing to submit these questions to the jury.

The jury might have believed Mr. Mann's off-hand statement, "I am almost sure that I got through about the middle of September," to be conclusive on the point, but they might well have noted that Mr. Mann kept a book (Abs. 65) and that he swore repeatedly and positively as to not cutting after the first day of October (Abs. 64), and so noting, certainly would have queried: "If he kept books and could swear to the 1st of Oc-

tober, why did he not swear positively to the 15th of September —if that were true?"

There was plenty of time between "about the middle of September" and the 1st of October for a considerable quantity of wood to have been cut, and for very substantial damages to have been done.

XI.

The court erred in deciding (Abs. 109):

"Now, the view that I take of such a case is that the damage which he has sustained is the damage to the mining claim, as such, and not the value of the wood that would necessarily be the measure of damages."

XII.

The court erred in deciding (Abs. 109):

"There has been no testimony whatever in this case as to the value of the mining claim, either before or after the wood was gone."

The above two specifications may be considered together, for taken together they amount to a holding that the only way to prove damages for the cutting **or** removing of timber from a placer mining claim in Alaska is to show the value of the claim before trespass, and its value after, and, of course, take the difference—a position upon the part of the court in support of which not one single case has been found.

Plenty of cases as to agricultural and timber lands, but not one case of a placer mining claim in Alaska, or anywhere else in the world.

In an action for timber cut **or** carried away from the land of the plaintiff, the measure of damage is:

Where the defendant is a knowing and willful trespasser,

the full value of the property at the time and place of demand, or of suit brought, with no deduction for labor or expense of defendant.

Where defendant is a purchaser without notice of wrong from a willful trespasser, the value at the time of such purchase.

Bolles Woodenware Co. v. U. S., 106 U. S. 432; 27 L. Ed. 230.

The court saying: "To hold that when the government finds its own property in hands but one remove from these willful trespassers, the holder can set up a claim for the value which has been added to the property by the guilty party in the act of cutting down the trees and removing the timber, is to give encouragement and reward to the wrongdoer, by providing a safe market for what he has stolen, and compensation for the labor he has been compelled to do to make his theft effectual and profitable."

And had this been ordinary timber land, still the rule laid down by the court in the case at bar would have been wrong.

"If the trees have a value which can be accurately measured without reference to the soil on which they stand, the recovery may be for the value of the trees destroyed or injured and need not be for the value of the land before and after the injury."

U. S. v. Taylor, 35 Fed. 488.

"In an action for cutting and removing standing timber, the plaintiff may recover the value of the timber at the place where it stood when the trespass was committed, and the defendant cannot insist that the measure of damages is the value of the lot before and after the timber was cut."

Stanton v. Pritchard, 4 Hun. 266, as explained in Firmin v. Firmin, 9 Hun. 572.

"In trespass, if the value of the timber covered the damage done, that will be the basis of recovery, but if not, it should be all damage done to the land by the cutting and removal of the timber."

Thompson v. Moiles, 46 Mich. 42.

"For trespass to real property, the damages are such an amount as will compensate for the injury done.

Ostrom v. San Antonio (Tex.), 77 S. W. 829.

"True measure is the highest injury suffered."

Salstrom v. Orleans Bar Gold Mining Co. (Calif. 1908). 96 Pac. 293.

" * * * and that measure will be applied which is most beneficial to the injured party."

Donk Bros. C. & C. Co. v. Novero, 135 Ill. App. 633.

It is not only a matter of common knowledge that an unprospected placer mining claim in Alaska has no possible standard of value, but the naked knowledge as to what a placer mining claim is must carry with it a thorough understanding of this fact.

A "wildcat" has no certain intrinsic value, and its ownership is but a right to its exploration and results therefrom; with the use of the timber as a valuable and necessary aid thereto.

In the very nature of things the damage to a "wildcat"—an unprospected placer mining claim—by the cutting or removal of the timber, is in the destruction of the possibility or practicability of its development; or in the added burden of expense thereto.

"Plaintiffs were the owners and in possession of a valuable mining claim; the court knows by common knowledge that the timber thereon was a valuable and necessary aid to the proper and economical working of the claim; plaintiffs were injured by the wanton and unlawful tres-

pass of the defendant in just the value of the timber taken."

McQuillan v. Tanana Electric Co., 3 Alaska, 120.

In the above case the court speaks of a valuable mining claim, but there was not a word in the record about any value except the value of the wood—the wood was valued at $3,000. The damages claimed, and allowed, were $3,000, as the court said, "just the value of the timber taken."

XIII.

The court erred in deciding (Abs. 110):

"Giving the fullest effect to the testimony of the plaintiff, as I am required to do in considering a motion of this kind, and assuming that there is a question of fact which ordinarily should be submitted to the jury, as to the location and discovery and marking of boundaries, I cannot see, if it were submitted to the jury, that they would be justified in finding anything more than nominal damages, and taking that view of the case, I think it not worth while to submit it to the jury."

The plaintiff was entitled to have the jury say as to whether the damages were nominal or substantial.

"In an action of trespass, the question of damages is a question particularly for the determination of a jury."

Drake v. Palmer, 4 Calif. 11.

And if the damages were brought in as nominal merely, he had a right to a judgment for whatever the damages were.

" * * * in such a case, merely entering the land and cutting boxes or chipping trees and removing therefrom crude turpentine, entitled plaintiff to nominal damages, though no actual damages were done."

U. S. v. Taylor, 35 Fed. 484.

"For trespass on land, at least nominal damages can be recovered if no special damages are proven."

Postal Telegraph-Cable Co. v. Kuhnen (Ga.), 55 S. E. 967.

Sharpless v. Boldt (Pa.), 67 Atl. 652.

Chase v. Cochrane (Me.), 67 Atl. 320.

Prewitt v. S. W. Tel. T. Co. (Texas), 101 S. W. 812.

Dwire v. Hanley (Conn.), 65 Atl. 573.

Yoder v. Reynolds, 72 Pac. 420.

U. S. v. Mock, 149 U. S. 277.

Hodges v. Pine Products Co., 33 L. R. A. (N. S.), 74.

Bishop v. Readsboro Chair Mfg. Co., 36 L. R. A. (N. S.) 1171.

"It is suggested that * * * the defendant * * * loses nothing. But he has lost a case which he is entitled to win, and the costs incident thereto."

Wait v. McKibben, 140 Pac. 862.

XIV

The court erred in deciding (Abs. 110):

"I might say, further, in regard to one point in this case, that the testimony did not show that any trespass had been committed by the defendants, or by anyone acting for them."

The uncontradicted testimony of Robert Mann shows (Abs. 56) that he cut wood for Mr. Riley; that the defendants went security for the grocery bills of several choppers, all working on the premises of the plaintiff (Abs. 57, 59, and 60); and that the defendants took the wood on and from the Elliott association, the premises of the plaintiff (Abs. 57).

As to the testimony of this Mr. Mann, we particularly desire to call the court's attention to some of it.

While Mr. Mann was a witness called by the plaintiff, yet

it can be readily seen that he was an adverse and unwilling witness for the plaintiff, and tried in every way to turn his testimony to and for the benefit of the defendant.

In answer to a question asked him (Abs. 56), "What were you doing in the fall of 1911 and winter?" he says:

> "The fall of 1911 I was cutting wood on Boulder creek. * * * "
>
> Q. "Who were you cutting wood for in 1911?"
>
> A. "Well, I cut for Mr. Riley in the fall. * * * "
>
> * * * * * *

And at Abs. 57:

> Q. "What became of the wood you cut?"
>
> A. "I sold it to Mr. Riley."
>
> Q. "What did it cost—how much did it cost to cut it?"
>
> A. "Well, I didn't make any more than wages. I got six dollars a cord for it."
>
> Q. "And was that wood delivered to Riley & Marston?"
>
> A. "It was delivered to Riley & Marston on the ground."
>
> Q. "Did you cut for Riley & Marston?"
>
> A. "I promised to sell my wood to Riley & Marston for his going security for my groceries at the store. I promised to sell him wood; I had been cutting for some time."

But conceding for a moment, for the sake of argument only, we contend that it makes no difference whether the wood was cut either before or after conveyance to plaintiff and his possession of the mining claim.

It was cut on the claim, by a willful trespasser, who knew before he commenced cutting that it was a mining claim, and

was purchased by the defendants, if not hired to be done, at $6.00 per cord, and was carried away by the defendants, in violation of statute, Section 322, Chapter 33, Carter's Code of Alaska, Part IV.

The timber at all stages of the conversion was the property of the plaintiff. Its purchase (if this was purchase) by defendants did not devest the title or right of possession.

* * * * * *

It is also plain that by purchase from the wrongdoer the defendants did not acquire any better title to the property than the vendor had.

Bolles Woodenware Co. v. United States, 106 U. S. 432; 27 L. E. 230.

The testimony of David Mutchler, uncontradicted and unquestioned, shows (Abs. 66, and 67) that he hauled the wood which Mann and others cut, and which Mann testified (Abs. 56, and 57) was cut from the Elliott association, for the defendants, at their orders, and for which they paid.

And one of the very significant matters of this trial was the fact that when Mr. Riley, one of the defendants, testified (Abs. 100), he did not attempt to deny any of the allegations of the plaintiff's pleadings, nor any of the testimony on the part of the plaintiff. The premises, the cutting, the taking and hauling away; the quantity, and value, all were passed in silence.

Is it reasonable to suppose that a defendant able to make a denial would not have done so? How would the jury have regarded this? The plaintiff had a right to know, either specifically under the instructions of the court, or generally by their verdict.

XV

The court erred in failing and refusing to submit the case to the jury at the conclusion of the testimony.

XVI.

The court erred in giving and entering judgment in favor of the defendants and against the plaintiff.

The above two, the concluding specifications, naturally consolidate.

The case for the plaintiff was proven in every material detail, or if not, that was a question for the jury.

CONCLUSION

In looking over the records of this case, counsel for the plaintiff is of the honest opinion that there has been a decided miscarriage of justice.

Being twice in default, defendant has been allowed to come in and defend, setting up matters entirely without the jurisdiction of the trial court.

It seems incredible that one, owning by purchase, and in possession of a placer mining claim in Alaska, performing annually the necessary assessment work required by law, and situated as we are here, six hundred miles away from the court, which is here for a term of only one or two months in the year, should be compelled to stand by helpless and see his claim despoiled by trespassers, and then have such acts of trespass ratified by the court.

Plaintiff submits that all the proof necessary to have succeeded in this case has been furnished.

The right of possession of plaintiff in the ground has, we

think, been conclusively proven by the evidence of J. F. Fox, W. R. Day and C. C. Purdy, as to the location of the ground as a placer mining claim; the setting out of stakes; the marking of the boundaries; the discovery of gold; the recording of the claim in the office of the recorder of the precinct; the subsequent performance of annual assessment work required by law; the successive deeds and conveyances from the locators down to the plaintiff; and the testimony of the plaintiff himself as to purchase; that he is the owner of the record title and in the actual possession of the claim, and has had the annual assessment work performed. All of this is shown, although we think and submit that it was sufficient, as against a mere trespasser, to show only possession of the plaintiff under his paper title, without having to search the ends of the earth to find the original locators of the claim.

As to trespass by the defendants, their agents or servants, from the evidence of Robert Mann, it cannot be disputed that the defendants trespassed upon this mining claim, by and through their agents, servants and employees. The witness Mann says he cut the wood on this claim and SOLD (?) it to the defendants for what it was worth to cut it (wages), $6.00 per cord, and that he promised to sell (?) it to the defendants if they would guarantee his grocery bill, which they did and which they paid.

And the testimony of this same Mann to the effect that others, to wit: James Furlong, James Kelly (with whose affairs he seemed to be very intimate, having worked with them), cut wood and SOLD (?) it to the defendants on similar terms, and several others who were on the same ground cutting wood—hundreds of cords of it.

And the testimony of the freighter, David Mutchler, who

hauled the wood away from the claim for the defendants and received $4.00 per cord for it, and who said that wood could not be replaced on the claim for less than $12.00 per cord.

And the testimony of the defendant J. E. Riley himself, who, being on the witness stand, did not attempt to deny the trespass, but confined his testimony to the statements that he could not find any gold on the dumps of some old shafts that he found on the claim.

It is the common experience of miners that many shafts may be sunk on a mining claim, resulting in many disappointments and blanks, and yet other shafts on the same claim may fully reward and repay the prospector and miner for his trouble, and in a claim of 160 acres, such as is the claim mentioned herein, the testimony of defendants and others as to finding no gold on these dumps must go for naught, in the light of the evidence of the locators of a valid discovery of gold on the claim, and the still present belief of those same locators that gold is there in paying quantities.

Nor can we see why the failure of the defendants to find gold in these old dumps be any excuse for their acts of trespass and the taking of the wood from the claim.

Plaintiff has sued for damages to his mining claim, basing his damage on the fact that this wood, like the wood on every mining claim in Alaska, is the one important item necessary to the working of such claim.

As said in the case of McQuillan v. Tanana Elec. Co. by our own court here in Alaska:

> "The court knows as common knowledge that the timber thereon was a valuable and necessary aid to the proper and economical working of the claim; plaintiffs

were injured by the wanton and unlawful trespass of the defendant in just the value of the timber taken."

It is also a matter of common knowledge that almost without exception the operation of every placer mine in the interior of Alaska necessitates the consumption of hundreds of cords of wood each year.

David Mutchler, freighter, testified that wood could not be replaced on plaintiff's mining claim for less than twelve dollars per cord. Plaintiff has based his damage at $3.00 per cord, claiming treble damages under the statute of Alaska governing such cases.

The trial court based his decision in this case partly for the reason that some of this wood, if not all, had been cut before the inception of plaintiff's title to the ground, but the testimony shows that every stick of it was **taken and carried away** after the date of plaintiff's deed, and as stated before, the statute does not confine itself to the cutting, but reads in the alternative, "**or carry away.**" So that the fact that the wood was carried and hauled away under defendants' instructions renders them liable. They were trespassers, and knew they were, and knew that they were doing wrong, and had no business on that claim.

The trial court further says that we did not prove that the claim had any value as a mining claim, either before or after the wood was taken. We do not know what experience the trial court has had with placer mining claims in Alaska, or elsewhere, but plaintiff himself knows that it is an impossibility to place a value on unproved placer mining ground, which may require thousands of dollars' outlay in prospecting, and then may prove worthless or otherwise, as the case may be. It is certain that

where wood is the principal working asset of a mining claim, such claim doubtless must be damaged by the taking away of that asset.

As to the amount of damage sustained to plaintiff's claim, we respectfully submit that we have proved damage in every cent claimed in plaintiff's complaint.

We earnestly contend that the owner and holder of an undeveloped placer mining claim, either in Alaska or elsewhere, is entitled to protection against wanton trespassers who seek to despoil that claim by taking away its most valuable asset and converting same to their own use.

We cannot understand why the trial court should direct a verdict for the defendant, and at the same time admit that plaintiff might be entitled to nominal damages.

We earnestly submit that under the law and the evidence in this case we are entitled to recover every cent prayed for in the complaint, and respectfully ask this honorable court for judgment accordingly.

Respectfully,

GEO. W. SAULSBERRY.
CHARLES E. TAYLOR.
GEO. W. ALBRECHT.